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Implementation of the international drug control treaties: changes in the scope of control of substances

Legal opinion from the Office of Legal Affairs of the Secretariat

Note by the Secretariat

At its intersessional meeting held on 29 January 2015, the Commission on Narcotic Drugs discussed substantive and procedural matters related to the scheduling of ketamine, following a notification by the Government of China recommending that ketamine be placed in Schedule I of the Convention on Psychotropic Substances of 1971.[1] At that meeting, the Secretariat was requested to seek a legal opinion on whether the Commission could schedule a substance under the 1971 Convention if the World Health Organization (WHO) has recommended that the substance should not be placed under international control. Accordingly, the relevant information and documents are reproduced below.

I. Request from the Commission on Narcotic Drugs for a legal opinion

1. In an inter-office memorandum dated 6 February 2015, the Secretary of the Commission on Narcotic Drugs brought to the attention of Stephen Mathias, Assistant Secretary-General for Legal Affairs, the request for legal advice on whether the Commission could schedule a substance under the 1971 Convention if WHO had recommended that the substance should not be placed under international control and informed him that the Secretariat had been asked to provide information

* E/CN.7/2015/1.

[1] The outcome of the first intersessional meeting of the Commission was circulated to Member States as a special message on 6 February 2015.

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to the Commission on the legal opinion at its next intersessional meeting, to be held on 23 February 2015.

2. In the part entitled "Background", as contained in annex I of that memorandum, the Secretary of the Commission informed the Assistant Secretary-General for Legal Affairs of the following:

(a) Pursuant to article 2, paragraph 1, of the 1971 Convention, the Government of China, in its correspondence dated 8 March 2014, had notified the Secretary-General of the United Nations that China recommended placing ketamine in Schedule I of the 1971 Convention;

(b) The Secretary-General had transmitted to all Governments and WHO a note verbale, dated 14 March 2014, annexing the notification and the information submitted by China in support of the recommendation that ketamine be placed in Schedule I of the 1971 Convention, and inviting Governments to provide comments on economic, social, legal, administrative or other factors that they saw as relevant to the possible scheduling of ketamine;

(c) During its intersessional meeting held on 29 January 2015, the Commission had discussed procedural aspects related to the scheduling of substances and, in particular, the impact of a negative recommendation by WHO in relation to a notification received from a State party. Some participants had been of the opinion that WHO assessments should be determinative as to medical and scientific matters and therefore the Commission was not in a position to place ketamine under international control. Other participants had noted that, while the Commission was to take into account the WHO assessment, which should be determinative as to medical and scientific matters, it was also to bear in mind the economic, social, legal, administrative and other factors it may consider relevant, and consequently could add the substance to any of the Schedules or, alternatively, it could decide not to schedule it.

3. The Secretary also informed the Assistant Secretary-General for Legal Affairs that the pre-layout version of the report of the thirty-sixth meeting of the WHO Expert Committee on Drug Dependence, held in Geneva from 16 to 20 June 2014, had been brought to the attention of the Commission as soon as it was made available by WHO.

4. Furthermore, the Secretary submitted the following documentation as annexes and attachments to the memorandum:

(a) The provisions of the 1971 Convention and the relevant parts of the *Commentary on the Convention on Psychotropic Substances*;

(b) The notification from China concerning the proposed recommendation for the international control of ketamine under the 1971 Convention;

(c) The relevant extract of the notification by the Director-General of WHO addressed to the Secretary-General of the United Nations dated 25 November 2014, concerning the recommendation not to place ketamine under international control;

(d) The relevant extract from the pre-layout version of the report of the thirty-sixth meeting of the WHO Expert Committee on Drug Dependence.

II. Inter-office memorandum dated 18 February 2015 from David Hutchinson, Principal Legal Officer in charge of the Office of the Legal Counsel, to Jo Dedeyne-Amann, Secretary of the Commission on Narcotic Drugs, relating to the authority of the Commission on Narcotic Drugs to schedule a substance under the 1971 Convention if the World Health Organization has recommended that the substance should not be placed under international control

1. I refer to your memorandum dated 6 February 2015, in which you state that the secretariat of the Commission on Narcotic Drugs was asked to seek our legal advice on the following question:

> Can the Commission on Narcotic Drugs schedule a substance under the Convention on Psychotropic Substances of 1971 if there is a recommendation from the World Health Organization that the substance should not be placed under international control?

2. We are aware that parties to the Convention and the Commission may take a different view to the responses we provide. As such, our response should not in any way be construed as the only or definitive view, and we would appreciate your conveying this understanding to the Commission.

3. Subject to that understanding, our response to your question is that, in our view, the Commission can schedule a substance under the 1971 Convention even if there is a recommendation from WHO that the substance should not be placed under international control, provided that the Commission has taken into account all relevant factors specified in article 2, paragraph 5, of the Convention before taking a decision.

4. A detailed analysis is contained in the annex to this memorandum.

Annex

1. The purpose of this annex is to provide a detailed analysis on the following question on which you have asked us for our advice:

> Can the Commission on Narcotic Drugs schedule a substance under the Convention on Psychotropic Substances of 1971 if there is a recommendation from the World Health Organization that the substance should not be placed under international control?

2. We understand that this question has been posed in relation to a notification from China under article 2, paragraph 1, of the 1971 Convention stating that ketamine should be added to Schedule I of the Convention, to which the World Health Organization (WHO) responded that the substance concerned should not be included in that Schedule. You have noted that the Commission on Narcotic Drugs is expected to act on the notification of China at its fifty-eighth session, to be held from 9 to 17 March 2015.

Functions of the Commission under the Convention

3. By way of background, the Commission on Narcotic Drugs was established by the Economic and Social Council by its resolution 9 (I) of 16 February 1946, and was mandated, among other things, to "assist the Council in exercising such powers of supervision over the application of international conventions and agreements dealing with narcotic drugs as may be assumed by or conferred on the Council". The 1971 Convention, which was adopted on 21 February 1971 and entered into force on 16 August 1976, and which is aimed at preventing and combating abuse of psychotropic substances and the illicit traffic to which it gives rise, sets out certain functions of the Commission under the Convention. Those functions were formally accepted by the Economic and Social Council by its resolution 1576 (L) of 20 May 1971.

4. Article 17 of the Convention, entitled "Functions of the Commission", provides, in paragraph 1, that "the Commission may consider all matters pertaining to the aims of this Convention and to the implementation of its provisions, and may make recommendations relating thereto."

5. Article 2 of the Convention then sets out the specific functions of the Commission in relation to the addition of substances to the Schedules of the Convention, the transfer of substances from one Schedule to another, and the deletion of substances from the Schedules. As far as the Commission's role in adding substances to the Schedules is concerned, which is the relevant scenario in the present case, article 2, paragraph 5, of the Convention provides that "the Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may add the substance to Schedule I, II, III or IV. The Commission may seek further information from the World Health Organization or from other appropriate sources."

Procedure for adding a substance to the Schedules of the Convention

6. Any consideration by the Commission under article 2, paragraph 5, of the Convention is preceded by several steps, in which WHO plays a key role. Under article 2, paragraph 1, of the Convention, a notification to include specific substances not yet under international control in a Schedule of the Convention may be made by a Party to the Convention or by WHO. Under article 2, paragraph 2, "the Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission and, when the notification is made by a Party, to the World Health Organization."

7. Pursuant to article 2, paragraph 4, of the Convention, WHO should conduct an assessment of a specific substance in accordance with the criteria set out in that article, and communicate its assessment and recommendation to the Commission. The Commission then considers the matter, pursuant to article 2, paragraph 5, quoted above.

8. In this context, we understand that the notification by China to include ketamine in Schedule I of the Convention was made under article 2, paragraph 1, of the Convention (E/CN.7/2015/7, annex III). We also understand that WHO recommended not to place ketamine under international control at this time, in response to the notification made by China (E/CN.7/2015/7, annex IV). Your question relates to whether the Commission may include a substance in a Schedule of the Convention, if WHO has recommended not to place the substance concerned under international control.

Role of the Commission and the parties

9. In the first instance, it is for the Commission itself to decide whether it has the competence to deal with a specific matter, such as the inclusion of a substance in a Schedule of the Convention in a case where WHO had expressed a contrary opinion. In this regard, rule 54 of the rules of procedure of the functional commissions of the Economic and Social Council, which is applicable to the Commission, provides that "a motion calling for a decision on the competence of the commission to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question." Therefore, if a member of the Commission puts forward such a motion, it is for the Commission to decide.

10. However, certain indications that may shed light on your question are set out below. We would like to emphasize that the points mentioned below do not purport to be an authoritative or definitive interpretation of the relevant provisions of the Convention and that other parties may take a different view.

Analysis of the relevant provisions

11. We first note that the Convention does not contain provisions that specifically deal with the situation described in your question. Article 2, paragraph 4, of the Convention deals with a situation where WHO communicates an assessment on a substance and any control measures necessary for the substance, and article 2, paragraph 5, authorizes the Commission to add any substance to the Schedules of the Convention.

12. However, there is no specific provision that explicitly deals with the procedure to be followed when WHO recommends not to place a substance under international control, or a specific provision that states that the Commission is free to take a contrary decision in case WHO makes such recommendation, or is bound by a WHO recommendation not to place a substance under international control.

13. As far as the nature of the WHO communication under article 2, paragraph 4, of the Convention is concerned, that article provides that the communication should contain an "assessment" of the substance concerned, together with "recommendations" on control measures. Article 2, paragraph 5, further provides that the assessments of WHO "shall be determinative as to medical and scientific matters". The word "determinative" seems to indicate that WHO assessments have a special status that serve to conclusively define the medical and scientific nature of a substance.

14. Article 2, paragraph 5, however, further provides that the Commission may add the substance to a Schedule "bearing in mind the economic, social, legal, administrative and other factors it may consider relevant". Therefore, it seems that the Commission is required to take into account not only the assessments of WHO as to medical and scientific matters, but also economic, social, legal, administrative and other factors. Only when they have been taken into account can the Commission proceed to decide whether to add the substance to the Schedule or not. Article 2, paragraph 5, therefore seems to indicate that the Commission is expected to reach a conclusion after taking into account all the relevant factors, rather than on the basis of only one or several factors, such as WHO assessments. This approach seems to have been accepted by the Commission (E/1983/15, para. 195).

15. Article 2, paragraph 5, of the Convention also clarifies that the Commission alone is authorized to add a substance to a Schedule of the Convention. The Convention does not confer that authority on WHO. The only exception is when a Party appeals the Commission's decision, in which case the Economic and Social Council may decide to add a substance to a Schedule of the Convention (article 2, paragraph 8, of the Convention).

Commentary on the Convention on Psychotropic Substances

16. In shedding light on your question, we have also consulted the *Commentary on the Convention on Psychotropic Substances* (E/CN.7/589), which was published in 1976 and which provides useful guidance in interpreting the provisions of the Convention. The commentary to article 2, paragraph 5, (p. 71) provides that:

> If WHO finds under paragraph 4 [of article 2] that a substance does not have the dangerous properties described in subparagraph *(a)*, clause (i) or (ii), and by consequence expressly or impliedly recommends in its communication to the Commission that the substance should not be controlled, the Commission would not be authorized to place it under control. Doing so would be incompatible with the provision that the WHO assessment should be "determinative as to medical and scientific matters", and also with the basic assumptions of the authors of the Vienna Convention which is intended to deal only with problems arising from the abuse of substances which have dangerous qualities as defined in the above-mentioned clause (i) or (ii).

17. The commentary seems to put emphasis on the determinative nature of the WHO assessments as far as medical and scientific matters are concerned, and the object and purpose of the Convention.

Subsequent practice

18. As far as subsequent practice is concerned, we have identified two potentially relevant cases dealt with by the Commission. In 1997, Spain proposed the inclusion of several substances in Schedules I and II of the Convention, but WHO recommended not to amend those Schedules to extend international controls collectively to some of the substances notified by Spain, and made its own recommendations on two substances in response to the proposal by Spain (E/1999/28/Rev.1, paras. 109 and 111). The Commission approved the WHO recommendations on the two substances, but there is no record of any action taken with respect to the substances to which WHO objected.

19. In 1991, WHO recommended that a substance should be deleted from Schedule IV of the Convention, and that it should not be transferred to any other Schedule (E/1991/24, p. 23). This was a case that concerned the deletion of a substance which was already included in a Schedule, rather than an objection to the inclusion of a new substance to a Schedule. However, the case is relevant in the sense that WHO recommended that the substance should not appear in any of the four Schedules of the Convention. In this case, the Commission unanimously decided to remove the substance from Schedule IV (E/1991/24, p. 23).

20. While these two cases seem to indicate that the Commission has generally followed WHO recommendations not to add substances to or maintain substances in the Schedules of the Convention, the Commission has, in the past, rejected a number of WHO recommendations to include specific substances in the Schedules of the Convention (E/1983/15, paras. 206-208; E/1984/13, para. 11). While the context was different from that envisaged in your question, i.e. a case where WHO recommended not to include a specific substance in a Schedule, the practice of the Commission to reject WHO recommendations is still relevant as it indicates that the Commission has not felt itself bound by WHO recommendations.

Conclusions

21. Article 2, paragraph 5, of the Convention does provide that WHO assessments are determinative as to medical and scientific matters of a substance, and that the Commission should take them into account, but the ultimate authority to decide whether the substance should be added to a Schedule rests with the Commission. In doing so, the Commission is required to take into account factors broader than medical and scientific factors. If the overall assessment of the Commission is to add the substance to a Schedule, it has the authority to do so, even if WHO has recommended otherwise. Therefore, it does not seem that the narrower assessments by WHO on medical and scientific matters alone could determine the course of action to be taken by the Commission.

22. As far as the views expressed in the *Commentary on the Convention on Psychotropic Substances* are concerned, it placed emphasis on the fact that WHO assessments are "determinative" as to medical and scientific matters of a substance to conclude that the Commission may not add a substance to a Schedule when WHO

recommends not to place a substance under international control. However, looking at article 2, paragraph 5, as a whole, the Commission is expected to take a broader perspective, and is required to take into account all relevant factors to reach a conclusion. From this perspective, if the Commission takes a decision not to include a substance in a Schedule without considering the relevant factors other than the WHO assessments, it could be said that the requirements under article 2, paragraph 5, incumbent upon the Commission have not been fulfilled.

23. Therefore, in response to your question, in our view, the Commission can schedule a substance under the 1971 Convention even if there is a recommendation from WHO that the substance should not be placed under international control, provided that the Commission has taken into account all relevant factors specified in article 2, paragraph 5, of the Convention before taking a decision.